

Huynh (Migration) [2017] AATA 2616 (20 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs My Trang Huynh
CASE NUMBER:	1619692
DIBP REFERENCE(S):	BCC2014/2239965
MEMBER:	Antoinette Younes
DATE:	20 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 20 November 2017 at 10:23am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Mutual commitment to each other – Applicant and sponsor live together – Genuine and continuing relationship

LEGISLATION

Migration Act 1958 ss 5F, 5F(2)(a)-(d), 65

Migration Regulations 1994 r 1.15A(3) Schedule 2 cls 820.211, 820.211(2)(a), 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 3 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 4 September 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211.
4. The applicant appeared before the Tribunal on 7 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets cl.820.211(2)(a).

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 14 April 2014. On the evidence, the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. In support of the visa application and the application for review, the applicant provided a number of documents, including:
 - a. NSW Marriage Certificate.
 - b. Statements of visa applicant, sponsor and others.
 - c. Statutory Declarations by supporting witnesses (Forms 888).
 - d. Photographs and cards.
 - e. Residential Tenancy Agreement in joint names.
 - f. Individual ANZ bank accounts and Commonwealth Bank joint account statements.
 - g. Receipts/invoices in individual and joint names for various purchases and costs.
 - h. AAMI Business insurance policy in both parties' names.

12. *Financial aspects of the relationship*

13. The couple lives in rented accommodation in Cabramatta. Rent payments are \$450 a week. The residential tenancy agreement is in the name of both the applicant and the sponsor. They have a joint account showing regular deposits and withdrawals. The couple set up a joint coffee shop business and they invested their savings in that business. They also borrowed \$40,000 from the sponsor's mother to support the business venture. Currently, the couple has a joint online business, *Taste of the Best*, selling imported goods. The sponsor delivers the goods to the purchasers.
14. In the course of the hearing, the applicant gave evidence that the sponsor, unbeknown to the applicant, had borrowed \$30,000 to set up a mirror importing business in partnership with another person but this business was unsuccessful. The applicant gave evidence that she found out about that business when the lawyer kept asking about the money. The Tribunal expressed concerns about the fact that the sponsor had engaged in a significant business without consultation with the applicant.
15. The Tribunal has remained to be concerned about this aspect of the relationship. However, on balance the Tribunal is of the view that this is insufficient to conclude that this aspect of the relationship raises doubts about the genuineness of the spousal relationship. Moreover, the Tribunal is of the view that the applicant was forthcoming about this issue and decided to disclose it to the Tribunal, even though this could give rise to concerns about this aspect of the relationship.

16. The Commonwealth Bank account shows regular household expenditure in terms of food and other everyday costs were paid from that account. Although the account shows that a limited balance is held at all times in that account, the Tribunal has not drawn any adverse inferences on that basis in recognition of the couple's limited financial position.

17. On the evidence before it, the Tribunal is satisfied that the parties pool their financial resources and share household expenditure. The Tribunal finds that the financial aspects of the parties' relationship are consistent with the couple being in a genuine and continuing spousal relationship.

18. ***Nature of the household***

19. The Tribunal accepts that the parties have lived together since July 2013, prior to their marriage. The couple provided consistent evidence regarding the arrangements for their household. The Tribunal is satisfied on the evidence that the nature of the household supports the finding of a genuine and continuing relationship.

20. ***Social aspects of the relationship***

21. The parties provided a number of statutory declarations attesting to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.

22. The Tribunal found the oral evidence provided by the parties to be consistent and persuasive evidence that the parties have been in a loving couple relationship for many years and that they provide one another with considerable support.

23. Although the applicant has provided limited corroborative evidence relating to the social aspects of the relationship, the evidence provided by way of photographs and statutory declarations support the finding that the relationship between the applicant and his sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the couple presents as being married to one another to their family, friends and the wider community.

24. ***Nature of the person's commitment to each other***

25. On the evidence before it, the Tribunal finds that the applicant and the sponsor have been in a committed relationship since they married in April 2014 and that they have lived together continuously since their marriage.

26. The Tribunal has conducted the hearing and met both the applicant and the sponsor. Although the Tribunal is cautious to make conclusions on the basis of personal observations, the Tribunal is satisfied that they presented as a couple who are committed to each other.

27. The couple's evidence was consistent and demonstrated detailed knowledge of each other's lives and background. Their evidence about their future plans was consistent. They both advised the Tribunal that they planned to have children. They provided medical evidence showing that they have made attempts to clarify any medical challenges that they might have.

28. The Tribunal is satisfied that the applicant and her partner are committed to being in a long-term relationship supporting the finding that the parties are in a genuine and continuing relationship.

29. **CONCLUSIONS**

30. In consideration of the evidence as a whole and in light of the above findings, the Tribunal is satisfied that at the time of application and at the time of this decision, the applicant and sponsor are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the applicant and sponsor live together and therefore do not live separately and apart on a permanent basis.
31. On the evidence, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
32. In consideration of the evidence as a whole and for the stated reasons, the Tribunal is satisfied that the applicant meets cl.820.211(2)(a) and cl.820.221.
33. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

34. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Antoinette Younes
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).